TL 1740

Presentation by Professor Roger S. Clark concerning the substance of the East Timor Case in the International Court of Justice CHR/IPJET Conference, London 5-6 December 1992

The geographical background to the Timor Gap case and the "solution" to it worked out between Indonesia and Australia have been adequately expounded by the discussion and map in the article by Jean-Pierre Fonteyne which has been circulated.[1] The essence of the problem is that while the width of the sea in the relevant area between the two coastlines varies from some 250-290 nautical miles, there are, geographically-speaking, two continental margins between the two land masses, a more than 200 nautical mile Australian margin to the south and a 40-70 mile margin to the north off the Timor coast. The two are separated by a deeper area, known as the Timor Trough. The issue (not one I shall even try to solve here since it is not directly raised by the case) is what are the legal implications of the geography. Australia argues that it is entitled to the shelf out to its margin; Indonesia and Portugal argue that they are entitled to a notional shelf out to the median line. The "solution" as between Indonesia in the so-called "Treaty on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia" is to create a joint "cooperation zone" allocated into three areas each with different regimes. Portugal claims to be left out.

Neither the Portuguese nor the Australian Memorials are public at the time of writing. It is necessary, therefore, to speculate about what form the argument may finally take, on the basis of the Portuguese Application instituting proceedings, and on the basis of past Australian statements that give an indication of what that country's approach might be. Since the Australian High Commission has arranged for the circulation at this conference of the article by Jean-Pierre Fonteyne (although without necessarily endorsing all his arguments) I shall offer some comments on that also. The parties will no doubt refine their position as the case proceeds.

The basic thrust of the Portuguese Application is that Australia has incurred international responsibility to the people of East Timor and to Portugal by failing to respect the duties and powers of Portugal as the administering power over East Timor, so recognized by the United Nations. It has done this by negotiating and concluding the Timor Gap Treaty with Indonesia. This action, it is contended, amounts to a denial of the right of the people of East Timor to self-determination and of related rights, namely the right to territorial integrity and unity and permanent sovereignty over natural resources.

---

[1] Fonteyne, The Portuguese Timor Gap Litigation before the International Court of Justice: A Brief Appraisal of Australia's Position.

As sources for the right of the people of East Timor to self determination, and to sovereignty over their natural resources, the Application relies upon:

- the relevant provisions of the United Nations Charter, notably Articles 1 paragraph 2, 55, 56, 73 and 75 et seq., interpreted in accordance with the practice of the organization;
- acts of the competent organs of the United Nations in application of that law and in particular the actions of the Security Council, the General Assembly and the Special Committee on Decolonization in respect of East Timor;
- principles of self determination as expressed in state practice and by various General Assembly resolutions, including the Declaration on the Granting of Indpendence to Colonial Countries and Peoples, the Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73 (e) of the Charter, and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, together with the decisions of international tribunals and, in particular the jurisprudence of the Interrnational Court of Justice;
- the principle of the permanent sovereignty of peoples and States over their natural wealth and resources as supported by State practice and by numerous United Nations resolutions, including resolution 1803 (XVII) of 14 December 1962 and resolution 3281 (XXIX) of 12 December 1974;
- the International Covenant on Economic Social and Cultural Rights and the International Covenant on Civil and Political Rights, to which Portugal and Australia are both parties, in particular, Article 1, paragraph 1 of each instrument with regard to the right of self determination, and Article 1, paragraph 2 of each instrument, concerning permanent sovereignty over natural resources.

Portugal also contends that Australia has failed to comply with its obligations deriving from Article 25 of the Charter[2] to accept and carry out Security Council resolutions 384 and 389 which dealt with East Timor. It also contends that, by excluding negotiation with Portugal, Australia has failed to comply with an obligation to negotiate with Portugal. This obligation is said to rest upon a custom that requires that states should negotiate on matters of common interest and, more particularly, on the custom relating to the negotiation of issues related to the delimitation and exploitation of maritime areas.

---

[2] "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

For the purposes of the preliminary objections phase of the case, Australia may contend that it is being placed in the uncomfortable position of having to defend the actions of a third party - Indonesia. Frankly, should the case reach the merits stage, I would be very surprised if Australia tried ultimately to make a case for the legality of Indonesia's actions in acquiring East Timor. It can hardly deny that Indonesia used illegal force. It can hardly claim that an act of self determination took place or that Indonesia had some legitimate historical or other title to the territory. Not only are the Indonesian claims spurious, but the Australian Government has, as the Minister of Foreign Affairs put it in November 1990, "been forthright in protesting the circumstances of incorporation."[3] Speaking in plenary on 12 December 1975[4] in explanation of his government's abstention on the General Assembly's first resolution on Timor after the invasion, the representative of Australia said:

> None the less, Australia does agree with the main principles set out in the draft resolution. It calls for respect of the principle of self determination in accordance with the Charter and the Declaration on the Granting of Independence to Colonial Countries and Peoples, the fifteenth anniversary of which the General Assembly commemorated this morning. It also calls upon Portugal to exercise its responsibilities as administering Power to continue to make every effort to find a solution by peaceful means.

Thus, unless the Australians plan to explain away a long series of statements to like effect, they are forced to make a somewhat different argument than that which the Indonesians might make on their own behalf. As explained by Mr Fonteyne, this Australian argument seems essentially to be that, regardless of the way in which Indonesia initially acquired the territory, Australia in its sovereign wisdom is entitled to recognize at some point that the illegally acquired "title" has been "consolidated" into a legal one.[5] It can thus deal with Indonesia in any way it likes. Australia, so the argument must run, accepted the "consolidation" either in 1978 (when it recognized the Indonesian incorporation de facto) or in 1979 (when it stated that it recognized incorporation de jure) or at least by the time of the signing of the Timor Gap treaty.

---

[3] Senator Gareth Evans, Statement to Timor Gap Forum, 3 November 1990.

[4] U.N. GAOR, 30th Sess., Plenary, 2439th mtg., at 1295, U.N. Doc. A/PV.2439 of 12 December 1975.

[5] Fonteyne, supra note 1, at 178.

I take it that the Australians regard this argument as responsive not only to the basic Portuguese contention about dealing in general with the Indonesians in denial of the Timorese right to self determination, but also to subsidiary Portuguese arguments about a breach of Article 25 of the Charter by ignoring the Security Council's resolutions, and a breach of the duty to negotiate the maritime boundaries.

I believe that there are some serious problems with the Australian recognition argument. For a start, its unilateral nature fits ill with the decisions of the Security Council clearly stating the illegality of the Indonesian acts, and with a series of decisions of the General Assembly up to 1982 (including that of 1976 in which the Assembly rejected the Indonesian claim to have annexed the territory, inasmuch as the people of Timor had been prevented from freely exercising their right to self determination). If the Security Council or the General Assembly were to back off their position things might be different - but they have not. The organization knows how to "repeal" decisions when it wants to. Last year, the General Assembly revoked its notorious "Racism-is-Zionism" resolution. In 1979 the Security Council terminated the sanctions against Southern Rhodesia after the General Assembly had insisted overwhelmingly that members had no unilateral right to terminate sanctions once they had been imposed by the Security Council. More recently, the Council has modified its sanctions against Iraq. Nothing like this has happened here. And Australia has not exactly rushed to New York to sponsor a resolution supporting "consolidation." The item of East Timor is in fact continued on the Agenda of each year's General Assembly meeting, even if no debate actually takes place. It is still actively debated at the Commission on Human Rights and at the Subcommission on Prevention of Discrimination and Protection of Minorities. Various resolutions have been adopted there. The Secretary-General's negotiations continue on the basis that Portugal is still the administering power. The Special Committee on Decolonization conducts an annual debate on the subject, in spite of the lone objections of Indonesia. East Timor is kept on the Special Committee's list of non-self-governing territories. All of this shouts out against the right of Australia to ignore the multilateral position and go it alone.

This is not all. There is also some general international law on the question of recognizing the acquisition of territory by force. Australia participated actively in the drafting of two unanimously adopted resolutions of the General Assembly in 1970 and 1974 which, I believe, constitute an unequivocal obligation not to recognize the acquisition of territory obtained by unlawful force. The relevant provision of the 1970 Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States provides that:

> The territory of a state shall not be the subject of acquisition by another state resulting from the threat or

use of force. No territorial acquisition resulting from the threat or use of force shall be regarded as legal.

The relevant provision of the Assembly's 1974 Definition of Aggression provides:

> No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

Modern international law forbids the recognition - whether initially or by consolidation - of title obtained by ilegal force.[6] (And the 1974 resolution's "is or shall be recognized" is especially explicit about this.) Whatever the rules of the game may have been in 1892, the rules are different in the international order represented by the newly reinvigorated United Nations Charter. This is supported by a whole series of multilateral resolutions and treaties - and some state practice - during the period between the two wars. It is implicit in Article 2, paragraph 4 of the United Nations Charter. It is crystallized in practice involving the Baltic States[7] and in the General Assembly resolutions which I have cited.[8]

There may perhaps be some scope for dispute about what exactly this obligation means, but the Australian actions run foul of even the most minimal interpretation. For example (and there may be other possibilities): An obligation not to recognize might mean an obligation not to deal with the aggressor in any manner at all. It might mean an obligation to deal with the aggressor only on the understanding that an express reservation of the position is made. It might mean an obligation not to grant de facto recognition. It might mean an obligation not to grant de jure recognition. Total non-dealing is probably too much to expect from a close neighbour - at the very least some humanitarian contacts have to be made to deal with refugee issues. I believe that international law means at the least that neither de facto nor de jure recognition should be expressly given. But even accepting a minimalist position, it is that no de jure recognition shall be given. Australia has done just that. I believe that it has acted illegally.

---

[6] There is some debate about whether title can ever be obtained by forced used legally (as in self defence). There is no need to enter that debate - Indonesia's actions cannot possibly be characterized as legitimate self defence against aggression.

[7] See generally, Hough, The Annexation of the Baltic States and its Effect on the Development of Law Prohibiting Forcible Seizure of Territory, 6 New York Law School Journal of International and Comparative Law 301 (1985).

[8] I have explored this material in more detail in Clark, Timor Gap: The Legality of the "Treaty on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia", [1992] Pace Yearbook of International Law.

Now Mr Fonteyne has not treated us to a footnote supporting his notion that "historical consolidation" represents current law, but one might have thought that he would at least make some effort to deal with the resolutions I have quoted - but there is not a word on them! At least the Australian Minister of Foreign Affairs and Trade addressed the issue in some of his statements on the matter. Responding to a question from Senator McIntosh in the Australian Senate in 1986, Senator Evans claimed that: "I make it plain that the legal status of the [Friendly Relations] declaration, which is not a treaty in any sense, has long been hotly contested."[9] I have elsewhere[10] explained how the Senator's position is simply bad law, both on the basis of the preparatory work of the Declaration and the way in which it was dealt with by the International Court of Justice in the Nicaragua case.

Instead of discussing what one might have thought of as black letter law, Mr Fonteyne discusses some highly selective, and not necessarily relevant state practice. He starts with the proposition that "[w]hether in any case, customary law encompasses a duty of non-recognition of 'illegal situations' is highly debateable." He then goes on to discuss Security Council action in respect of Southern Rhodesia, Namibia, the Bantustans of South Africa and the Turkish Republic of Northern Cyprus. In each of these cases the Council instructed states not to recognize the entities in question. Mr Fonteyne's argument seems to be that unless the Security Council reminds states of their obligations, they do not have obligations.

I note first that the category of "illegal situations" is probably too broad. Southern Rhodesia, the Bantustans and Namibia were all objectionable situations and "illegal" in their different ways. But none of them were of the same ilk as East Timor where the right to self determination was denied by a plain simple old invasion across international boundaries. One might have thought that it was not necessary to remind a democratic government that such actions were illegal.[11] There was, indeed, nothing ambiguous about Indonesia's actions which could not be seen by a state acting with the "good faith" of which Mr Fonteyne speaks.

---

[9] Hansard, Senate (Australia), 20 March 1986, at 1377.

[10] Clark, supra note 8.

[11] By the same token, Mr Fonteyne's reference to the "universal recognition" of the Hungarian and Czech governments installed by force by the Soviet authorities, is not quite on target. The Soviets, horrible as they were, did not purport to annex Czechoslovakia and Hungary.

Be that as it may, the Council's action in respect of the Republic of North Cyprus and its later action in respect of Iraq and Kuwait[12] does raise a question about whether the duty not to recognize only arises when there is a decision to that effect by the Security Council. I should have thought that the obvious answer to this is that the obligation not to recognize simply arises from the general law. A statement such as that in the Declaration concerning Friendly Relations does not say "No territorial acquisition ... resulting from the use of force shall be recognized as lawful <u>if the Security Council says so</u>." It simply says that such an acquisition shall not be recognized as lawful. Now I agree that this throws some obligation on states to assess the situation in the absence of the Security Council's spelling everything out. Australia did assess the situation. According to its own statements, it found the mode of acquisition wanting. Once it has done that, I do not believe that it can in good faith back away.

One might also add, that while the Security Council has primary responsibility for the maintenance of international peace and security, other organs - the General Assembly and the Special Committee on Decolonization, for example - have a role to play too.[13] In 1976, the General Assembly asserted unequivocally that it "<u>Rejects</u> the claim that East Timor has been integrated into Indonesia, inasmuch as the people of the territory have not been able to exercise freely their right to self-determination and independence."[14] And the Special Committee continues to list East Timor as a non-self-governing territory with Portugal the administering power.

Then there is Mr Fonteyne's support for "historical consolidation" being "seen to have operated in a variety of contexts, <u>including in some instances, situations that had an unquestionable illegal origin</u>: Chinese authority over Tibet, following the Red Army's 1951 invasion, has remained virtually unchallenged by the world community, as has, with a few notable but until recently ineffective exceptions, the Soviet Union's annexation of the Baltic republics." (Italics in original.)

---

[12] S.C. res. 662 of 9 August 1990, U.N. SCOR, 45th Yr., Resolutions and Decisions, at 20, U.N. Doc. S/INF/46 (1991), called upon states "not to recognize [the annexation of Kuwait by Iraq], and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation."

[13] <u>See</u> Certain Expenses of the United Nations [1962] I.C.J. 151 (General Assembly and maintenance of peace).

[14] G.A. Res. 31/53, U.N. GAOR, 31st Sess., Supp. No. 39, at 125, U.N. Doc. A/31/39 (1976).

I would be happy to make a case for the self determination of Tibet, but the sad fact is that "Chinese authority" over it had been "unchallenged" by many a Foreign Office long before 1951.[15] Tibet was never lucky enough to make the list of non-self-governing territories. Nor was its fate addressed by the Security Council or the General Assembly.

As for the Baltics, that the Soviet Union's "annexation" was "virtually unchallenged" is just plain wrong. A compilation of state practice on this issue lists non-recognition de jure by the United States, the United Kingdom (with some backsliding), Germany, Ireland, Canada, Australia, France, Yugoslavia, Denmark, Belgium, Spain, Portugal, the Holy See, Malta, Greece, Italy, Luxemburg, Turkey, the Netherlands, most of Latin America, the Philippines, South Korea and both Chinas.[16] Since the re-establishment of Baltic sovereignty, states have been proceeding to re-establish treaty relations with Estonia, Latvia and Lithuania on the basis that the treaties they entered into (both bilateral and multilateral) between 1920 and 1940 are still in force and that none of the Soviet treaties apply to them. Not a perfect record, but pretty clear practice!

A typical statement before the demise of the USSR is that made on Estonia and Latvia Independence Day 1983, by the Prime Minister of Australia:

> I should like to take this opportunity to reaffirm that the Australian Government does not recognize de jure the incorporation of the Baltic States into the Soviet Union. In doing so, we demonstrate our continuing commitment to the purposes and principles of the United Nations Charter and to the cause of democracy and freedom in the world.[17]

The world made a fifty year commitment to principle in the Baltic case. Why not in Timor?

In fact, then, there is a considerable body of state practice in particular cases - to say nothing of the state practice represented by the Friendly Relations and Aggression resolutions - to the effect that recognition should not be granted to the

---

[15] See generally, International Commission of Jurists, The Question of Tibet and the Rule of Law (1959); Chris Mullin, for Minority Rights Group, The Tibetans (1981). The matter did not come up in the Security Council; El Salvador tried to institute a debate in the General Assembly, but the matter was adjourned sine die. Compare the East Timor situation on which the Security Council and the General Assembly both spoke emphatically.

[16] Hough, supra note 7.

[17] Prime Minister Hawke, quoted by Hough, supra note 7, at 429.

acquisition of territory obtained by illegal force.[18]

[18] See, e.g., R. Langer, Seizure of Territory: The Stimson Doctrine and Related Principles in Legal Theory and Diplomatic Practice (1947) (referring to practice on Manchuria and numerous resolutions of international organizations and multilateral treaties) and other material cited in Clark supra note 8.